Supreme Court, U.S.
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No. 03-210

IN THE

Supreme Court of the United States

MICHAEL L. FOLEY,

Petitioner,

v.

EUGENIA BERG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION FOR RESPONDENT EUGENIA BERG

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QUESTIONS PRESENTED

Petitioner sets forth one issue for review: "Does the Federal Constitution provide, independent of any state or federal collateral order doctrine, a right to appeal an interlocutory order infringing upon a fundamental liberty interest?" Because this statement oversimplifies the issues and does not address jurisdictional obstacles, Respondent submits the following questions:

1. Did Petitioner preserve his question for review when he did not assert it until his petition for rehearing in the Court of Appeals of Maryland, which that court denied without comment?

2. Is Petitioner correct in equating a discovery order requiring simple, relatively non-invasive blood and urine tests and a physical exam, issued under Maryland's equivalent to Fed. R. Civ. P. 35, with the order requiring the administration of antipsychotic drugs at issue in *Sell v. United States*, __ U.S. __, 123 S. Ct. 2174 (2003)?

3. Does a discovery order requiring blood and urine tests and a physical exam of a party, pursuant to rules of civil procedure allowing such discovery, infringe upon a "fundamental liberty interest"?

4. Does Maryland's final judgment rule, which does not allow interlocutory appeals of discovery orders requiring physical or mental examinations, violate procedural due process?

5. Is a state appellate court decision denying an interlocutory appeal of a discovery order a final judgment or decree reviewable by this Court?

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Respondent Eugenia Berg respectfully requests that this Honorable Court deny the petition for a writ of certiorari by Michael L. Foley seeking review of a decision by the Court of Appeals of Maryland dismissing his appeal of an interlocutory discovery order entered by the Circuit Court for Anne Arundel County, Maryland.

RESPONSE TO STATEMENT OF THE CASE

Petitioner ignores the pertinent facts demonstrating that the order at issue is a routine discovery order requiring relatively non-invasive medical tests and examination.

Sophia Foley, the incapacitated person who is the subject of this petition, was born on September 21, 1939. She grew up and lived in Taylor, Michigan, an endemic area for Lyme disease, for 20 years, before moving to Maryland and marrying Petitioner. Mrs. Foley gave birth to a daughter in 1985, at age 46.

Mrs. Foley's symptoms apparently began in 1988 or shortly thereafter. The exact progression is not clear due to a lack of medical records from 1986-90. Nevertheless, she apparently became depressed and withdrawn in 1988 and abruptly began to change her activities in 1990. Shortly thereafter, she began to experience memory loss and confusion. By mid-1992, when she was only 53 years old and her daughter only six, she had developed obvious neurocognitive deficits such as confusion, poor memory, and child-like behavior.

A neurologist diagnosed dementia from early onset Alzheimer's disease. Experts for both parties and the Lyme Disease Foundation, which submitted an amicus brief in the

Court of Appeals of Maryland in support of the Respondent, concur that Alzheimer's disease is diagnosed by ruling out other possible causes. It cannot be definitively diagnosed until autopsy. According to the neurologist, age 53 is a very young age to suffer from dementia due to Alzheimer's.

On June 25, 1992, Mrs. Foley signed a Health Care Power of Attorney designating Mr. Foley as her agent responsible for her medical care and treatment. That agreement gave one direction for her care: "I wish to live and enjoy life as long as possible. However, I do not wish to receive medical treatment which will only postpone the moment of my death from an incurable and terminal condition or prolong an irreversible coma."

Mrs. Foley's condition continued to deteriorate thereafter. By the fall of 1993 or August 1994, she reportedly had become incompetent to make decisions regarding her medical care, although she could still take care of daily needs such as washing, dressing, eating, cooking food, and stating intentions. By 1997, however, she had become substantially incapacitated due to her dementia. She exhibited mental confusion and was unable to bathe and dress herself, prepare her meals, or care for herself or others. Nevertheless, Mrs. Foley is not entirely incapacitated. Medical records indicate that she eats with her fingers and sometimes responds to music by attempting to dance.

Lyme disease shares many symptoms of Alzheimer's disease, multiple sclerosis, and other diseases of the nervous and musculo-skeletal systems. It especially resembles syphilis, as both may lay dormant and asymptomatic within the central nervous system for many years.

Mrs. Foley has had numerous common symptoms of late-stage Lyme disease: dementia, severe arthritis, difficulty in swallowing due to impairment of the Vagus nerve in the neck, depression, and seizures. Moreover, the onset of her symptoms at ages 47-51 corresponds with the average onset of late-stage Lyme disease.

Alarmed over their sister's condition and the fact that she had not received any medical attention in the preceding two years, in 1997, Ms. Berg, an older sister of Mrs. Foley, and two other sisters petitioned the Circuit Court for Anne Arundel County, Maryland, to become co-guardians for Mrs. Foley. In response to their stated concerns about possible Lyme disease, Mr. Foley allowed blood tests for serological antibodies to Lyme disease: (1) an "ELISA" test that was described by her treating physician as "weak positive"; and (2) two "Western Blot" tests that were negative.

Because these tests only detect the presence of antibodies in blood, they are not accurate. The bacterium that causes Lyme disease does not like to reside in the bloodstream and instead invades the central nervous system, thus avoiding antibody formation. As a result, the ELISA and Western Blot antibody tests have extremely high false negative rates: it is undisputed that 30-35% of infected patients test negative. The FDA has therefore issued an advisory that ELISA/ Western Blot tests "may be easily misinterpreted" and should be used as a corroborative measure, *i.e.*, "only to support a clinical diagnosis of Lyme disease," not to exclude or establish an infection.

The petition did not, however, provide medical opinions challenging the decisions of Mr. Foley. As a result, the court dismissed the petition but indicated that the decision could

be revisited if such medical testimony were provided in the future. Ms. Berg was granted visitation rights at the adult day care facility that cared for Mrs. Foley during the day.

In April 2000, Ms. Berg visited the day care center and found that Mrs. Foley was not there. For the next two to three days, Ms. Berg telephoned the center and was told that Mrs. Foley was absent. Understandably concerned, she went to the Foleys' house, where she found no one home and the kitchen door open. She entered and found Mrs. Foley alone, awake, and sitting on a sofa in the living room. Upon investigation, she discovered that Mr. Foley had been leaving his wife alone and unattended all day, five days a week, sitting on a sofa in the empty house with the kitchen door left open, until Mrs. Foley's teenage daughter returned home from school in the late afternoon. This had gone on for days and undoubtedly would have persisted for weeks, as Mr. Foley's payments to the center had fallen in arrears even though Ms. Berg had previously sent Mr. Foley a check large enough to pay past debts and continue attendance at the center.

Faced with the prospect of her sister remaining home without appropriate care or supervision, and aware of new and more accurate tests for Lyme disease, Ms. Berg again petitioned the Circuit Court for Anne Arundel County for co-guardianship. Unlike the first petition, in this preceding Ms. Berg presented affidavits from three separate physicians who opined that Mrs. Foley had not received proper medical attention and treatment for her dementia and other medical conditions. They pointed out that she (1) had not received a medical examination in the past three years; (2) had not received a Pap smear, mammogram, or other medical examination appropriate for a woman of her age in many years; and (3) exhibited symptoms of Lyme disease. They

concluded that Mrs. Foley's physicians had breached the standard of care and that she urgently needed new medical treatment.

The physicians also recommended a new and definitive test for Lyme disease and related tick-borne diseases: polymerase chain reaction ("PCR") tests of a patient's blood or urine for the bacterium's DNA. Although this test has a low positive rate (only 5 to 20% of infected patients test positive), unlike the antibody tests, a positive result is 100% conclusive for active Lyme disease infection.

Because the new petition provided a medical opinion in support, the court denied a motion by Mr. Foley to dismiss the new petition. Nevertheless, to proceed on the petition, Ms. Berg needed additional information. Under the Maryland statutes and rules governing guardianship proceedings, a petition for guardianship must include certificates from two licensed physicians (or one physician and one psychologist) indicating that they have examined or evaluated the individual and setting forth their opinions as to the "cause, nature, extent, and probable duration of the disability[.]" Md. R. Civ. P. 10-202(a)(1); *see also* Md. Code Ann., Est. & Tr. §§ 13-705(c)(2) (i) & (ii). This rule is not waivable, even if the parties to the proceeding concur that the disabled person is not competent. *See In re Lee*, 132 Md. 696, 711-12, 754 A.2d 426, 436-38 (2000). Moreover, if the person having control of the disabled person refuses to permit medical examination of the disabled person and the disabled person may be at risk unless a guardian is appointed, the trial court must hold a hearing, and, if it finds that examinations are needed, appoint physicians to report upon the cause, nature, extent, and probable duration of the disability. Md. R. Civ. P. 10-202(b)(2).

Mr. Foley did not consent to an examination by Ms. Berg's experts. To meet her obligations under Md. R. Civ. P. 10-202, Ms. Berg followed Maryland procedure and moved for a medical examination and testing under Md. R. Civ P. 2-423, a civil discovery rule equivalent to Fed. R. Civ. P. 35. Thus, while Petitioner contends that the trial court's discovery order for a medical exam and tests was "remarkable," the order merely followed settled, mandatory procedures under Maryland law. The cause, nature, extent and probable duration of Mrs. Foley's disabilities were in dispute, and the court therefore was obliged to order the medical discovery to answer those questions.

After extensive briefing and a thorough hearing, the trial court granted Ms. Berg's motion in substantial part and issued a discovery order providing for minimal urine tests, a blood test, a physical exam, and a vision test. Tellingly, while Petitioner characterizes the discovery order as requiring "experimental" treatment, he does not discuss the order's terms. This is not inadvertent. The order in question was hardly extraordinary. It merely required a single physical examination of Mrs. Foley, a single blood specimen, collection of up to ten urine specimens over a ten-week period, and a single non-invasive "visual contrast" eye examination. While Mr. Foley objected to each of these procedures, the blood specimen was the only procedure that he opposed as invasive and traumatic, purportedly because Mrs. Foley would require sedation. The attorney appointed by the court to represent Mrs. Foley proffered that the day care center could collect the urine specimens without trauma or difficulty. Mr. Foley did not dispute that statement.

During this appeal, Petitioner demonstrated that his concern over the purported invasiveness of a blood test was

a hollow deception. Even as he waged a bitter and costly appeal to prevent a new blood test of Mrs. Foley for Lyme disease, he has ordered further blood specimens to be drawn from Mrs. Foley in order to, *inter alia*, repeat the same ELISA and Western blot serological tests for Lyme done in 1997. This test, conducted on a blood specimen collected in June 2001 while Mr. Foley's appeal was pending in the Court of Special Appeals of Maryland, and after Petitioner had already obtained a stay of the PCR blood test ordered by the trial court, utterly belies Petitioner's claims that blood tests would be invasive, intrusive, unnecessary, and unfairly burdensome to Mrs. Foley.

That Mr. Foley directed his own blood tests without also allowing for the court-ordered PCR blood test – a test that, unlike the serological tests, can definitively confirm the presence of active Lyme or other related tick-borne diseases – speaks volumes to the gamesmanship at play here. Surely, if blood was being drawn, and especially if it was being drawn *for a Lyme disease test*, a PCR test should have been arranged or an additional sample drawn at the same time to prevent any future traumatic "invasion" of Mrs. Foley. Instead, by taking the very step that he has consistently proclaimed is unnecessary and ill-advised – ordering a blood test for Lyme disease – Petitioner has waived any plausible claim that the discovery order for PCR tests is unnecessary and/or traumatic for Mrs. Foley. His actions confirm what has long been obvious: Petitioner's justification for opposing the order, his sworn statements that a second blood test for Lyme disease would needlessly inflict great trauma, is a figleaf for his intractable and arbitrary opposition to any intervention by Ms. Berg or the courts.

Finally, Petitioner does not suggest here, and has never argued below, that the procedures employed by the trial court violated due process. Nor could he. Mrs. Foley had an attorney appointed to represent her interests (the same attorney who represented her in 1997), and that attorney supported the request for additional Lyme testing, although she believed a physical examination unnecessary.[1] The trial testimony from the 1997 proceedings were incorporated into the record, and each side submitted affidavits from multiple experts. The trial court held two days of hearings with all parties represented by counsel. Mr. Foley was permitted to move for reconsideration and to submit new evidence. As Petitioner was given a full and fair opportunity to present all arguments and evidence, he cannot claim that those procedures were constitutionally deficient.

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1. The attorney did not alter this position until the end of the Maryland appellate proceedings. She did not participate in the proceedings in the Court of Special Appeals of Maryland. She similarly did not oppose Ms. Berg's petition for a writ of certiorari filed in the Court of Appeals of Maryland, and she did not file a brief on the merits in that court. Nevertheless, with no warning, she filed a "reply brief" in that court that abandoned her support for testing and instead argued that due to the impact of the litigation upon the Foley family, she believed that it would be best for all that the case end.

REASONS FOR DENYING THE PETITION

A. The Question Presented By The Petition Differs Materially From The Issue Decided By The Lower Courts And Was Not Raised Until A Belated Post-Decision Motion For Reconsideration.

The specific issue presented by Petitioner here – "Does an Independent Constitutional Right Provide for an Interlocutory Appeal Protecting Fundamental Liberty Interests?" (Pet. at 10) – was not timely presented to the state courts. Instead, Petitioner first raised this issue in his motion for reconsideration filed *after* the Court of Appeals dismissed his appeal. Under this Court's settled precedents, this belated effort to concoct a constitutional issue comes too late to preserve the issue for review by this Court.

Petitioner had ample notice and opportunity to raise his constitutional challenge to Maryland's final judgment rule. In the intermediate appellate court, he filed a fourteen-page motion for a stay, much of which argued that the discovery order "meets all of the requirements of the collateral order exception to the final judgment rule." (Mot. to Stay Order of Disc. at 2). *See also id.* at 8-14. He never contended that the Maryland final judgment rule was unconstitutional as applied to this case.

Thereafter, Ms. Berg moved to dismiss his interlocutory appeal as impermissible under state law, and Petitioner opposed the challenge to appealability by relying upon his pending Motion to Stay Order of Discovery, not by raising a new constitutional issue. *See* Resp. to Mot. to Dism. App. at 1-2.

In the Court of Appeals, this failure to raise the issue was even more pronounced. Ms. Berg's petition for a writ of certiorari asserted lack of appellate jurisdiction as the first issue for review by that court. Petitioner's lone sentence in response merely recited to the decision of the Court of Special Appeals below: "It is Mr. Foley's opinion that the reasoning of the Court of Special Appeals as to why this appeal fits into this [collateral order] exception requires no further explanation or support." (Resp. to Pet. for a Writ of Cert. at 2). Even worse, despite the fact that the Court of Appeals granted review of all issues raised by Ms. Berg's petition, and that Ms. Berg again devoted a substantial portion of her brief to that issue, Mr. Foley's brief on the merits simply stated that he "need not address this issue again, and elects to submit upon the wisdom of the Court of Special Appeals on this issue." (Br. of Resp. at 44). Thus, despite ample notice of his peril, Petitioner left an open field for the Court of Appeals to apply its settled rule against interlocutory appeals of discovery orders.

Petitioner's attempt to demonstrate sufficient preservation of his constitutional challenge to the Maryland final judgment rule, *see* Pet. at 5-7, is highly misleading. Each of those arguments in the courts below discussed his contention that the *discovery order* implicated substantive due process rights of Mrs. Foley (*i.e.*, "constitutionally protected liberty interests"), *see id.*, not that denial of a right to appeal under the final judgment rule could violate procedural due process. That issue was never raised until his motion for reconsideration, A48-65, which, as this Court has repeatedly held, comes too late to establish a federal issue for review by this Court. *See Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997) (per curiam) ("we have generally refused to consider issues raised clearly for the first time in a petition

for rehearing when the state court is silent on the question"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (where "Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal," which "denied the petition without opinion," it "is well settled that this Court" will not grant review").[2]

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2. The decisions to this effect are legion. *See, e.g., Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring) ("[i]t has been the traditional practice of this Court, however, to decline to review claims raised for the first time on rehearing in the court below"); *Prudential Fed. Sav. and Loan Ass'n v. Flanigan*, 478 U.S. 1311, 1311 (1986) (Rehnquist, J.) ("claims presented by the applicants are not properly before" the Court where the "constitutional issues . . . were not properly presented . . . until the applicants filed for rehearing," which the state court "denied . . . without comment, consistent with its practice of refusing to consider issues not pressed at each stage of the litigation"); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958) (argument raised for first time in motion for rehearing was "not seasonably presented"); *Radio Station WOW, Inc. v. Johnson* 326 U.S. 120, 128 (1945) ("[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration here"); *Herndon v. Georgia.*, 295 U.S. 441, 443 (1935) ("[t]he long-established general rule is that the attempt, to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it"); *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 163 (1932) (petition for rehearing raising due process issue for first time "cannot serve as the basis for review by this Court"); *Citizens' Nat'l Bank of Cincinnati v. Durr*, 257 U.S. 99, 100 (1921) (petition for rehearing, denied without opinion, "must be regarded as having come too late to raise any question for review by this court"); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919) ("The settled rule is that [if] the essential federal question . . . [is] first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point"); *St. Louis & S.F.R. Co. v. Shepherd*, 240 U.S. 240,

(Cont'd)

Neither of the two exceptions to this rule applies here.

First, the Court of Appeals of Maryland did not issue an opinion deciding this issue. It is therefore presumed, as a matter of law, that the court did not rule upon it: When "'"the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."'" *Rotary Int'l*, 481 U.S. at 550 (quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974)). Thus, boilerplate language by the state court that it "considered" the petition for rehearing (A37) does not suffice. *Consol. Tpk. Co.*, 228 U.S. at 333-34; *Forbes v. State Council*, 216 U.S. at 399.

(Cont'd)

241 (1916); *Bowe v. Scott*, 233 U.S. 658, 663 (1914) ("it is elementary that . . . a petition for rehearing affords no ground for invoking the jurisdiction of this court"); *Consol. Tpk. Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 333-34 (1913) ("Nothing is better settled than that it is too late to raise a Federal question for the first time in a petition for a rehearing"); *Forbes v. State Council*, 216 U.S. 396, 399 (1910) ("[i]t has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late"); *Mut. Life Ins. Co. v. McGrew*, 188 U.S. 291, 311 (1903) (petition for rehearing "came too late"); *E. Bldg. & Loan Ass'n v. Welling*, 181 U.S. 47, 48 (1901) (same); *Pim v. City of St. Louis*, 165 U.S. 273, 274 (1897) (same); *Bushnell v. Crooke Min. & Smelting Co.*, 148 U.S. 682, 689 (1893) ("The attempt to raise for the first time a federal question in a petition for rehearing . . . is clearly too late").

Second, Petitioner cannot credibly claim surprise by the Court of Appeals' decision. He had ample opportunity to raise his purported constitutional right to interlocutory appeal in the lower courts. The decision did not reverse any precedents, nor did it present an unexpected interpretation of state law. Indeed, it went out of its way to point out that, under settled Maryland law, "the four requirements of the collateral order doctrine are very strictly applied," that "appeals under the doctrine may be entertained only in extraordinary circumstances," that such appeals are typically dismissed summarily, and that discovery orders are "consistently held" not to fall under the collateral order doctrine absent "a very few" extraordinary situations far from the "typical" discovery order at hand. (A6-9). The court cited eleven decisions that presaged its ruling. *Id.*[3]

Rule 10(c) limits certiorari to questions actually decided by the state court. The Petition fails to meet that standard.

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3. The Maryland appellate rules requiring parties to raise issues in their substantive briefs are also well established. The failure to do so generally is deemed a waiver. *See ACand S v. Asner*, 344 Md. 155, 189, 686 A.2d 250, 267 (1996) (denying motion for reconsideration because, *inter alia*, argument was never raised in brief). *See also Klauenberb v. State*, 355 Md. 528, 552, 735 A.2d 1061, 1074 (1999); *Hyde v. State*, 228 Md. 209, 218, 179 A.2d 421, 425 (1962); *Comptroller of Treas. v. Aerial Prods., Inc.*, 210 Md. 627, 644, 124 A.2d 805, 814 (1956) (citing cases). Under Md. R. Civ. P. 8-605, Maryland appellate courts have broad discretion to deny a motion for reconsideration summarily, without deciding the issues raised therein. *See State v. Gross*, 134 Md. App. 528, 578 n.4, 760 A.2d 725, 751 n.4 (2000).

B. By Mischaracterizing The Discovery Order As Compelling "Treatment" Similar To *Sell v. United States*, Petitioner Distorts This Case.

Petitioner also distorts the substantive issue at hand. His Petition *presumes* that the discovery order infringes upon a fundamental liberty interest of Mrs. Foley, going so far as to proclaim that the Court of Appeals found as much. *See* Pet. at 8 (claiming that the "Court of Appeals of Maryland's decision determin[ed] that, despite permanent and irreparable deprivation of fundamental liberty interests," the discovery order was not appealable) (parenthesis deleted). The Court of Appeals made no such determination. To the contrary, the court concluded that the order for a medical examination was "a typical discovery order aimed at ascertaining critical facts upon which the outcome of the guardianship controversy might depend." (A8).

Indeed, in an effort to bootstrap this Court's recent decision in *Sell v. United States*, __ U.S. __, 123 S. Ct. 2174 (2003), Petitioner egregiously mischaracterizes the nature of the discovery order. He repeatedly describes it as requiring involuntary "medical testing and treatment," *see, e.g.*, Pet. at 10, even though the discovery order requires only a physical examination and minimal tests and ***no treatment*** whatsoever. (A13-15). *Sell*, by contrast, involved treatment but not tests, *i.e.*, forced administration of antipsychotic drugs to a mentally ill criminal defendant. This extreme measure is a far cry from the routine medical tests ordered below.[4]

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4. It is well-established that forced administration of antipsychotic medication implicates a "'significant'" constitutionally protected liberty interest. *See Sell*, __ U.S. at __, 123 S. Ct. at 2183 (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)).

By conflating "treatment" with "tests," Petitioner has deliberately obscured the constitutional issues at hand. *Sell* is not applicable here, and, because the Petition rests entirely on *Sell*, it fails to demonstrate a constitutional deprivation.

C. Petitioner Ignores The Settled Rule Of Law Regarding The De Minimis Invasiveness Of Physical Examinations And Tests.

Petitioner mischaracterizes the discovery order for an obvious reason: this Court has consistently rejected claims that court-ordered blood or urine tests and physical examinations infringe fundamental liberty interests.

The Court made this point clear when it affirmed the constitutionality of Fed. R. Civ. P. 35 in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). Plaintiff in that case challenged a court-ordered medical examination as infringing important and substantial rights of liberty and privacy, contrary to the Rules Enabling Act's prohibition against rules of civil procedure that abridge, enlarge, or modify any substantial right. The Court rejected that position, holding that "[t]he asserted right" of privacy against court-ordered physical and mental examinations is "no more important than many others" abridged by the Federal Rules of Civil Procedure. 312 U.S. at 14. The rule therefore did not infringe "important and substantial rights theretofore recognized." *Id.* at 13. *See also id.* at 14 (only a finding of contempt for disobedience, not the examination, "offends the important right to freedom from invasion to the person").

Indeed, the Court warned of serious dangers that would result from upholding the plaintiff's claim of a fundamental right "of freedom from invasion of the person." It explained, "If we were to adopt the suggested criterion of the importance

of the alleged right we should invite endless litigation and confusion worse confounded." *Id.* This case bears out that prophesy: Petitioner has been able to delay vital court-ordered medical testing and examination for ***2½ years***, even though Maryland law requires expedited adjudication of guardianship petitions, *see* Md. Code Ann., Est. & Tr. § 13-705(f), and Mrs. Foley's health has continued to deteriorate. That this has occurred even as Mr. Foley has authorized the same "invasion" of Mrs. Foley that he opposes here (*i.e.*, the taking of blood specimens for medical tests, including tests for Lyme disease), vividly illustrates the sort of cynical litigation mischief predicted in *Sibbach*.

Two decades later, the Court reaffirmed the absence of any constitutional issue arising from Rule 35 in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). There, the Court concluded that defendants as well as plaintiffs were subject to discovery under Rule 35, even if they had not placed their medical condition in controversy. The Court affirmed that this rule did not abridge substantive rights: "We hold that Rule 35, as applied to either plaintiffs or defendants in an action, is free from constitutional difficulty and is within the scope of the Enabling Act." *Id.* at 114.

These decisions are definitive. As one commentator wrote nearly 50 years ago, "the argument that physical examinations are of themselves an infringement of personal liberty is an anachronism." Richard J. Barnet, *Compulsory Medical Examinations Under the Federal Rules*, 41 Va. L. Rev. 1059, 1063 (1955). That reality has not changed. This Court has repeatedly confirmed the de minimis nature of blood and urine tests when reasonably compelled to advance an important government interest. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 625 (1989) (reiterating relative

insignificance of blood tests as "'such tests are a commonplace in these days of periodic examinations'" and "'that for most people the procedure involves virtually no risk, trauma, or pain'") (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966)); *id.* at 666 n.7 (collection of urine sample is not "a significant invasion of privacy" if collection process respects privacy); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658-60 (1995) (same); *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) ("[t]he blood test procedure has become routine in our everyday life"); *see also Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) (blood testing poses "slight" intrusion that is "not significant" compared to reasonable governmental interests).

This case is no different. Petitioner has ordered blood tests imposing the same "violation" of personal freedom as that allegedly caused by the discovery order. This exercise in hypocrisy belies any credible claim that the order infringes "fundamental" rights.

D. This Court Has Held Repeatedly That The Lack Of An Appeal Right Does Not Violate Due Process.

Petitioners' other assumption, that the denial of an interlocutory appeal may violate due process, is equally unfounded. This Court has consistently held that if a party receives a full and fair hearing in the court of first instance, due process does not require any appeal, let alone interlocutory review. *See, e.g., Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) ("as [has been] frequently determined by this court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance"). As Justice Frankfurter put it, "the right to judgment from

more than one court is a matter of grace and not a necessary ingredient of justice." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).[5]

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5. Again, numerous cases so hold. *See Lindsey v. Normet*, 405 U.S. 56, 76 (1972) ("this Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review"); *Griffin v. Illinois*, 351 U.S. 12, 18 (1955) ("a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all"); *Nat'l Union of Marine Cooks v. Arnold*, 348 U.S. 37, 43 (1954) (while right of appeal "is important and must be exercised without discrimination, such a review is not a requirement of due process"); *District of Columbia v. Clowans*, 300 U.S. 617, 627 (1937) ("Due process does not comprehend the right of appeal."); *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 536 (1926) ("the well-settled rule [is] that an appellate review is not essential to due process of law, but is a matter of grace"); *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 287 (1912) (the "right of appeal is not essential to due process"); *Rogers v. Peck*, 199 U.S. 425, 435 (1905) ("the state has the right to determine for itself . . . the appellate tribunals, if any, to which such causes may be carried to review"); *Reetz v. Michigan*, 188 U.S. 505, 507 (1903) ("we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question"); *McCane v. Durston*, 153 U.S. 684, 686 (1894) ("review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law"); *Andrews v. Swartz*, 156 U.S. 272, 274 (1895) (same); *The Francis Wright*, 105 U.S. 381, 386 (1881) ("The whole of a civil law appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case. Everything beyond that is matter of legislative discretion, not of constitutional right.").

States therefore are free to permit or restrict rights of appeal however they see fit:

> "[Appellate review] is wholly within the discretion of the state to allow or not to allow such a review." "It is therefore clear that the right of appeal may be accorded by the state to the accused upon such terms as, in its wisdom, may be proper;" and "whether an appeal should be allowed, and, if so, under what circumstances or on what conditions, are matters for each state to decide."

Andrews v. Swartz, 156 U.S. 272, 274 (1895) (quoting *McCane v. Durston*, 153 U.S. 684, 687 (1894)). This is true even in capital cases. *See id.*; *Rogers v. Peck*, 199 U.S. 425, 435 (1905); *Kohl v. Lehlback*, 160 U.S. 293, 297-99 (1895). In at least two states (Virginia and West Virginia) appeals remain discretionary, notwithstanding Petitioner's asserted constitutional right.

This black-letter principle is dispositive. Petitioner does not, and cannot, suggest that he was denied due process in the trial court proceedings. He does not contend that more than 100 years of this Court's jurisprudence regarding the lack of a constitutional right of appeal of final judgments was in error. Thus, the Petition implicitly devolves to the absurd proposition that a constitutional right of appeal adheres to interlocutory collateral orders but not to final judgments.

Instead of accounting for this settled and dispositive case law, Petitioner asserts that *Sell* signaled a sea-change in the rights of interlocutory appeal. *Sell*, according to Petitioner, did not just rest upon the collateral order doctrine but also

upon some implied constitutional principle that is sufficient, in and of itself, to establish a right of interlocutory appeal if constitutional issues are raised. *See* Pet. at 13-15. This argument is utterly meritless.

Sell neither stated nor implied any new constitutional principle regarding rights of appeal. Rather, it merely found that the order compelling administration of antipsychotic medication satisfied the collateral order doctrine as set forth in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). *See Sell*, __ U.S. at __, 123 S. Ct. at 2182 ("this District Court order does appear to fall within the 'collateral order' exception" to the final judgment rule). And the collateral order doctrine itself is nothing more than a "practical rather than a technical construction" of the statutory requirement for final judgments for appeals brought under 28 U.S.C. § 1291. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Otherwise, had *Sell* intended a new constitutional right of appeal for interlocutory orders affecting alleged constitutional rights, it would not have analyzed whether the important issue was "'completely separate from the merits of the action,'" a pivotal element of the collateral order doctrine that is missing here. *Compare Sell*, __ U.S. __, 123 S. Ct. at 2182 (quoting *Coopers*, 437 U.S. at 468) *with* A8 (explaining why discovery order was intertwined with merits).

Admitting that *Sell* is "murky" on the issue – a euphemism for utterly silent – Petitioner tries to find support from a few cases that he contends are "at odds" with the Court of Appeals of Maryland's decision. *See* Pet. at 8. These cases do nothing of the sort, as each simply relied on the collateral order doctrine or unique features of state law, and none involved discovery orders. *In re Master Key Antitrust*

Litig., 528 F.2d 5, 11 (2d Cir. 1975), dismissed an interlocutory appeal of an antitrust class action as failing to satisfy the collateral order doctrine; the only "constitutional" issue concerned a due process challenge to a consolidation order. *In re Brittany S.*, 147 N.H. 489, 490, 792 A.2d 384, 385 (2002), merely invoked a state supreme court rule giving it discretion to hear interlocutory appeals. And in *Commonwealth v. $9,847.00 U.S. Currency*, 550 Pa. 192, 196, 704 A.2d 612, 614 (1997), *reversing id.* 161 Pa. Com. 548, 637 A.2d 736 (1994), the Pennsylvania Supreme Court ***rejected*** the decision of the intermediate court, relied upon by Petitioner here, that the appeal could proceed under the collateral order doctrine, and instead reversed the intermediate court under a statute giving it discretion to hear extraordinary cases.

Petitioner also fails to account for cases such as *Bowles v. Comm'l Cas. Ins. Co.*, 107 F.2d 169, 170 (4th Cir. 1939) and *Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992), which have denied interlocutory appeals of examinations ordered under Rule 35. Those cases, along with the many decisions rejecting interlocutory appeals of orders denying the privilege against self-incrimination, the attorney-client privilege, and other vital rights, confirm the lack of a constitutional issue here.

Finally, Petitioner's claimed constitutional right simply is not tenable as a practical matter and thus fails the *Matthews v. Eldridge* three-part test for procedural due process. *See Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (due process rights depend, in part, on fiscal and administrative burdens posed by additional requirements). If any order alleged to infringe constitutional rights were automatically appealable on an interlocutory basis, the impact on trial courts

would be extreme. Blood tests ordered in paternity cases, mental examinations in custody cases, property inspections or access ordered in real estate or environmental contamination cases, and testimony by deponents or witnesses claiming Fifth Amendment privilege against self-incrimination all could be subject to interlocutory appeals. As the 2½-year delay in this case attests, such a rule would wreak procedural havoc on trial courts.

E. The State Court Decision Is Not Final.

Finally, this Court lacks jurisdiction under 28 U.S.C. § 1257(a), as the appeal is interlocutory and not an appeal from a final judgment or decree of the highest state court. Although the decision of the Court of Appeals of Maryland is final as to the application of the Maryland collateral order doctrine, it neither decides Petitioner's constitutional challenge based upon *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990), nor satisfies the federal collateral order doctrine under 28 U.S.C. § 1291. Both grounds preclude review here.

First, state court judgments are not final if further proceedings might address federal issues. *See Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (per curiam) (possibility of "piecemeal review with respect to [additional] federal issues" renders state court ruling non-final irrespective of whether case satisfies exceptions to final judgment rule); *Radio Station WOW*, 326 U.S. at 127 ("where the remaining litigation may raise other federal questions that may later come here, . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews").

Second, discovery orders are not final under the federal collateral order doctrine unless the party is held in contempt. *See Cunningham v. Hamilton County*, 527 U.S. 198, 208-09 (1999) (only contempt citation renders discovery sanction appealable final order).[6] If the order is not final under 28 U.S.C. § 1291(a), it is not final under § 1257(a).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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6. *Accord, United States v. Philip Morris Inc.*, 314 F.3d 612, 619 (D.C. Cir. 2003) (order to disclose allegedly privileged materials deemed final because civil contempt is not immediately appealable in D.C. Circuit); *FDIC v. Ogden Corp.*, 202 F.3d 454, 548 n.2 (1st Cir. 2000) (discovery order not final until contempt); *Connaught Labs., Inc. v. SmithKline Beecham P.L.C.*, 165 F.3d 1368, 1370 (Fed. Cir. 1999) (order not final where review could be obtained *after* contempt citation). *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 121-22 (4th Cir. 1994); *Reise*, 957 F.2d at 295 ("A party aggrieved by the order assures eventual review by refusing to comply.").